TC02147

Appeal number: LON/2007/2056

VALUE ADDED TAX – MTIC – HMRC's refusal to repay VAT on supplies connected with fraudulent VAT evasion – connection conceded by the appellant – only issues were whether the appellant knew or should have known of the connection – Axel Kittel v Belgian State and Mobilx v Commissioners for HMRC considered – held the appellant did not actually know of the connection, but it should have known of it because the only reasonable explanation for the circumstances in which the supplies took place was that the supplies were connected with fraudulent VAT evasion – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ELSE REFINING AND RECYCLING LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN WALTERS QC
ANDREW PERRIN FCA

Sitting in public in London on 9, 11, 12, 13, 16, 17, 18 and 20 January 2012

Harendra de Silva QC and Simon Baker, instructed by Mavin & Co. Ltd., for the Appellant

Adam Hiddleston and Rupert Jones, instructed by the Solicitor for HMRC, for the Respondents

DECISION

Introduction and the issues of law for decision

1. This is an appeal by Else Refining and Recycling Limited ("Else") against a decision of the Respondent Commissioners ("HMRC") to deny to Else the right to deduct as input tax the VAT on the following purchases by Else:

In the period 07/06 (the month ending 31 July 2006)

(1) A purchase of 4,410 Intel P4 SL 7Z9 central processing units ("CPUs") from Maximise Services Limited ("Maximise") – invoice date 10 July 2006 – VAT disallowed - £48,928.95 (**Deal 1**)
(2) A purchase of 500 Nokia 3220 mobile telephones from Maximise – invoice date 18 July 2006 – VAT disallowed - £3,644.38 (**Deal 2**)
(3) A purchase of 1,600 Nokia 6101 mobile telephones from Maximise – invoice date also 18 July 2006 – VAT disallowed - £16,537.50 (**Deal 3**)
(4) A purchase of 2,750 Nokia N90 mobile telephones from Exhibit Enterprise Limited ("Exhibit") – invoice date 19 July 2006 – VAT disallowed - £127,531.56 (**Deal 4**)

In the period 08/06 (the month ending 31 August 2006)

(5) A purchase of 2,000 Apple iPods Nano 4GB units from Regal Portfolio Limited ("Regal") – invoice date 30 August 2006 – VAT disallowed £37,800 (**Deal 5**).

2. From the above, it can be seen that the total amount of VAT in issue is £234,442.39. We note that Else contended that what we have described above as Deal 2 and Deal 3 were in reality one deal. However it is convenient to treat them as two deals in respectively different products, even though Else's supplier (Maximise) and Else's customer Enastech FZE of Dubai ("Enastech") was the same for both deals and the purchases and sales by Else all took place on the same day (18 July 2006).

3. HMRC's decision was based on their opinion that the purchases referred to formed part of an overall scheme to defraud the revenue and that there were features of the transactions and the conduct of Else which demonstrated that Else knew or ought to have known that this was the case. In legal terms, HMRC allege that, having regard to objective factors, the supplies to (purchases by) Else referred to, were supplies to a taxable person (Else) who knew or should have known that, by the purchases, it was participating in transactions connected with the fraudulent evasion of VAT (cf paragraph 61 of *Axel Kittel v Belgian State, Belgian State v Recolta Recycling SPRL* (Joined Cases C-439/04 and C-440/04 [2006] ECR I-6161 ("*Kittel*").

4. In England the Court of Appeal considered the proper interpretation of *Kittel* (a decision of the ECJ) and its application in *Mobilx v Commissioners for HMRC* [2010] EWCA Civ 517 ("*Mobilx*"). The Court of Appeal held (*ibid.* at [81]) that the burden lies upon HMRC to prove a trader's state of knowledge. Thus if HMRC prove that the trader in question actually knew that his (its) purchase has been or will be connected to fraud, that will be enough to deny the trader's entitlement to deduct the relevant VAT as input tax (the actual knowledge limb of the *Kittel* test). Alternatively, if HMRC prove that the only reasonable explanation for the circumstances in which the trader's purchase takes place is that the purchase has been or will be connected to fraud, then that also will be enough to deny the trader's entitlement to deduct the relevant VAT as input tax (the 'should have known' limb of the *Kittel* test).

5. In this appeal, the evidence served by HMRC as to the connection of Else's purchases with fraudulent evasion of VAT has caused Else to concede that the connection is proved to the required standard.

6. The relevant fraudulent evasion of VAT was, in connection with Deal 1, by Technolgz.net Limited ("Technolgz") (a company at 3 places removed from Else's supplier, Maximise, which went missing, owing £48,465.90 in VAT in respect of the goods supplied in Deal 1). In connection with Deal 2, the relevant fraudulent evasion of VAT was also by Technolgz. (also at 3 places removed from Else's supplier, Maximise) and the VAT evaded by Technolgz in respect of the goods supplied in Deal 2 was £24,116.88. In connection with Deal 3 the relevant fraudulent evasion of VAT was also by Technolgz (again at 3 places removed from Else's supplier, Maximise) and the VAT evaded by Technolgz in respect of the goods supplies in Deal 3 was £16,380. In connection with Deal 4, the relevant fraudulent evasion of VAT was by Phone City Limited ("Phone City"), which went missing, owing £127,2118,44 in VAT in respect of the goods supplied in Deal 4. In connection with Deal 5, the relevant fraudulent evasion of VAT was by Cybersol UK Limited ("Cybersol"), which went missing, owing £37,467.50 in VAT in respect of the goods supplied in Deal 5.

7. The only issues for our decision in this appeal (as was accepted by both parties at the commencement of the hearing) is whether, in terms of *Kittel* and *Mobilx*, HMRC have proved that, on the balance of probabilities, Else knew or alternatively should have known that its purchases in Deals 1 to 5 inclusive were (rather than were probably) connected with fraud.

8. We heard oral evidence from Officer Susan Bransgrove, John Fletcher (a principal adviser to KMPG LLP), Derek Ashley (an After Sales Manager at T Mobile between 1992 and 2000), Anthony Else ("AE") (Managing Director of Else), Jason Else ("JE") (AE's son and a director of Else). Their oral evidence supplemented witness statements made by them. Else's witnesses, AE, JE and Derek Ashley, each produced two witness statements. Officer Susan Bransgrove produced two witness statements (relating to data obtained by HMRC in relation to First Curacao International Bank ("FCIB")) and also adopted and gave oral evidence relating to two witness statements produced by Officer Rachel

Woodfield, the case officer, who was unavailable to give evidence at the hearing. Mr de Silva, for Else, helpfully raised no serious objection to this convenient course.

9. We derived little assistance from the evidence of John Fletcher and Derek Ashley.

10. We also had in evidence a witness statement made by Officer Roderick Stone, but he did not appear to give oral evidence or to be cross-examined. In addition, we had in evidence witness statements made by other Officers in relation to the connection between Else's purchase transactions in issue with fraudulent evasion of VAT, but since that connection was conceded, those other Officers were not called to give oral evidence.

11. There was also extensive documentary evidence before us.

The facts

12. From the evidence we find facts as follows – where we relate evidence given by any witness we accept it unless the contrary is stated or otherwise we indicate that we do not accept it.

13. The Else family have been in the business of refining and recycling electronic equipment (including mobile telephones) for a long time. Since 1992 the business has been conducted through the medium of the Appellant company, Else. Else registered for VAT with effect from 1 January 1993. Else moved to its current premises at Shefford, near Stevenage, in 1997.

14. As was made clear by AE in evidence given in camera (on which he was not cross-examined by Mr Hiddleston) Else conducts some extremely sensitive business in relation to the disposal of electronic assets, including computers, for important public and private sector customers. This is extremely responsible work, requiring a high level of discretion and security and, according to AE's unchallenged evidence, Else has always carried it out in a highly professional and wholly satisfactory fashion. This business continues and is now, and has always been, Else's main, or core, business.

15. The first relevant contact between Else and HMRC was Officer Woodfield's visit on 2 July 2003, when she met AE. This visit was arranged (at Officer Woodfield's request only some hours before, and so the visit was effectively 'unannounced') following contact made by Else in May 2003 with HMRC's Redhill office seeking confirmation of the VAT registration of Else's customer, Cellular Surplus (which was given). Officer Woodfield was a member of an MTIC team – which meant that her work was entirely made up (according to Officer Bransgrove's evidence) 'in visiting companies which were involved in wholesaling of mobile phones, computer chips or could perhaps be seen as likely to become involved in that'. We have in our papers a note made contemporaneously by Officer Woodfield in which she describes Else's main business activity as follows:

> 'Refining and recycling of computers, precious metals and mobile phones. Goods are either sold on as second hand, scrapped or for further refining to extract precious metals used in manufacture. All purchases from within the UK, vast majority of sales are also within the UK, some second hand monitor sales to the EC (minimal).'

16. Officer Woodfield noted that Else's principal suppliers of phones were: 'Orange, T Mobile, Nokia, Global Fulfilment [VAT number given] and Novatek [VAT number given]', and that Else's principal customers for second-hand phones were: 'Lexus Telecom, Harrow [VAT number given], Cellular-Surplus, Norwich [VAT number given]'. She also noted that Else's mark-up on sales of second-hand phones was 'up to 25%'.

17. Her comment under the heading 'Recommendations as a result of visit[s] made' was as follows:

> 'This is a well established large, local family business. They have been disposing of mobile phones for the big players for the last couple of years and have recently started to deal in the second-hand market – all phone transactions are within the UK.
>
> Old/obsolete mobiles are bought as a lot, these will then be examined to see if they can be used for parts or need scrapping. They are then dismantled and appropriately disposed of apart from the circuitry containing precious metal which is sold on for refining.
>
> Mobiles are also bought second-hand for onward sale and ultimately most are sold on by other cos. to third world countries.
>
> Else is a specialist waste disposal co. dealing mainly in computers and is closely monitored by the Environment Agency and other bodies and has many government contracts. As much as possible is recycled and what waste there is is disposed of under strict controls using stringent processes.
>
> Mr Else is hoping to expand the mobile phone aspect of the business as there is a large market to be exploited, he does not however, envisage the company doing anything other than reported above and as such there **is no apparent MTIC risk**' (original emphasis)

18. Officer Woodfield's evidence is that at the meeting on 2 July 2003 'MTIC trade was discussed in general terms only as [Else] was not engaging in transactions that exposed the company to the risk of involvement in fraudulent tax losses'. She also stated in her witness statement that she had learned from AE that he hoped to expand Else's mobile phone trade, but only in the second-hand market. She added: 'As was my usual practice I discussed the risks of MTIC fraud with [AE], though no written record was made of the conversation. The company was not considered an MTIC risk on the information provided to me at that time.' Officer Bransgrove stated that MTIC officers (such as herself and Officer Woodfield) were expected to explain what MTIC fraud was to all the companies they visited, whether or not they had suspicions of what the companies were doing or about to do, because the officers understood that sometimes companies change direction and they felt the companies needed to be aware of the risks within the wholesale market.

19. AE 'adamantly' denied that Officer Woodfield had discussed MTIC fraud with him on that visit. He said that she had only told him that there were

problems within the mobile phone industry and that the Revenue was suffering a loss of revenue, 'but that it didn't relate to me'. He said that he had not considered what HMRC's problems might be and had not asked Officer Woodfield for more information, because he was buying from reputable companies (Orange, T Mobile) and selling goods within the UK. He had asked for a Redhill check on Cellular Surplus (the first time he had asked for a Redhill check) simply because Cellular Surplus had asked for a Redhill check on Else.

20. Mr Hiddleston suggested to AE in cross-examination that he had closed his eyes to the problems referred to by Officer Woodfield. AE denied that. Our conclusion on this point from the evidence is that AE did not engage with Officer Woodfield on the subject of precisely what problems HMRC were having in relation to loss of revenue from the wholesale trade in mobile phones because he was confident that Else would not be affected by those problems. In this, we consider, he showed both an over-confidence (as subsequent events made clear) and also that he did not at that time understand or take sufficiently seriously Else's obligations as a taxable person not to engage in any transactions which would connect Else with other transactions in the goods dealt with by Else, carried out by other parties in the supply chain beyond its own supplier, which were abusive of the VAT system.

21. There was a VAT assurance visit on 30 June 2004 (at which the visiting officer expressed entire satisfaction with Else's book-keeping records but at which MTIC was not mentioned).

22. In May 2005 Else undertook its first export deal in new mobile phones (buying in the UK and selling outside the UK).

23. The next significant meeting was on 3 August 2005, when Officer Geoff Swinden of HMRC's Luton MTIC team visited AE at Else's premises (again on an 'unannounced' basis). According to Officer Swinden's contemporaneous note, the visit lasted from 90 minutes, between 11 am and 12:30 pm on that day. The visit was described in that note as a 'Broker Visit'. Officer Swinden's comments as recorded in that note were as follows:

> 'Visit instigated following receipt of info from CCT that [Else] had started dealing in new phones for export.
>
> Unannounced visit 3.8.05 – met with [AE], Director. Visual inspection of premises – several large units supported the description of main business activity ie recycling all types of computer and electronic products.
>
> [AE] explained that one of his main suppliers of second hand mobile phones was Lexus Telecom UK Ltd – he had dealt with them for many years.
>
> They had approached him about handling some of their export sales of new phones – he said they had advised him that they had so many export deals they were unable to financially support all the available transactions.
>
> In response to my questions he admitted he had found this situation somewhat bizarre but having researched the customer, being aware of his own solid business relationship with

> Lexus and having sought advice from both his accountant and his bank manager he had decided to proceed with a couple of deals.
>
> [Else] is financially sound, and was able to finance the two deals from their own funds. [AE] said that he was able to support two such deals each quarter, and so had done four export deals to date. His current business was bases [*sic*] on high volume, low mark ups and so the higher mark ups available on the export sales were appealing.
>
> [AE] appears to be a successful and knowledgeable businessman who has built up his business over many years. He deals with numerous Government Agencies regarding all the recycled products he produces, and correctly applies the Gold Scheme when selling recovered gold. [Else] keeps meticulous and thorough records (see previous visit reports) and I have no doubts as to the overall credibility of either [AE] or [Else].
>
> I issue [*sic*] to [AE] a copy of PN 726 and explained the potential risks to [Else] if it was subsequently established that there was a tax loss within the supply chain.
>
> [AE] had received the normal letter from Redhill, and I reminded him that he was required to clear all suppliers and customers (new phones only) before each transaction was completed.
>
> Uplifted copies of purchase and sales invoices for the four deals to date.'

24. Officer Swinden's unannounced visit occurred a few days after AE had received a letter dated 27 July 2005 from HMRC at Redhill (the 'normal letter from Redhill' referred to in Officer Swinden's note). The letter requested Else's 'continued assistance' in verifying the VAT status of 'new Customers/Suppliers' with the Redhill office. A copy of Public Notice 726 'Joint and several liability in the supply of specified goods' was also enclosed.

25. AE's evidence in his witness statement was that he 'perused Notice 726 and ensured that there was compliance with every recommendation and check made within it'. His cross-examination made clear that this was an overstatement – he did not carry out credit checks on his suppliers, nor did he obtain trade references.

26. AE's evidence in his witness statement was that he did not recall using the word 'bizarre' in relation to the approach made to Else by Lexus Telecom UK Limited ("Lexus") but otherwise agreed with the accuracy of the comments in Officer Swinden's note.

27. This was substantially modified under cross-examination and re-examination. In relation to the approach from Lexus (we had no evidence from the person he dealt with at Lexus, Naresh Chawda) he said that the proposal was not that Else should handle some of Lexus's export sales of new phones, but that Else should buy phones which Lexus were being offered but could not handle, with a view to Else exporting them, it being understood by AE (and presumably also by Naresh Chawda) that exports sales were 'where the money would be made and it would have been no good buying from people like that and trying to sell internally, because [AE didn't] think there would be much of a margin left' (a quotation from AE's evidence in re-examination).

28. AE explained that he understood that the reason that Lexus could not handle the export sales itself was that it could not fund the VAT cost pending repayment by HMRC. Else, on the other hand, from its own financial resources, was able to carry this cost to a certain extent.

29. AE also described in his oral evidence as 'very inexact' the reference in Officer Swinden's note to AE having sought the advice of his accountant and bank manager before deciding to proceed with a couple of deals emanating from the Lexus connection. He said under cross-examination that he had not sought advice from either person in connection with these deals, but had done so some time previously in connection with completely different deals, purchases of 'packages' of phones by Else from Novatech and onward sale. He was 'absolutely adamant' about that. He denied Mr Hiddleston's suggestion that he had told Officer Swinden that he had sought that advice in relation to the deals emanating from Lexus to show that he had recognised that the deals might have constituted 'a potentially risky scenario'. He had no explanation for his having failed to make these additional points on Officer Swinden's note in his witness statement, other than 'these things are, I'm afraid, quite easily missed'.

30. AE also '[did not] recall' Officer Swinden telling him that Else should 'clear all suppliers and customers [with HMRC's office at Redhill] before each transaction was completed'. He did not say he was 'adamant' that Officer Swinden had not said this, but he did not remember him doing so. In any case he made the point that checking with Redhill on each transaction was impractical because of the delay experienced in getting a reply. Else obtained a Redhill clearance dated 14 February 2006 on Maximise (its supplier in Deals 1, 2 and 3) and a Redhill clearance dated 23 February 2006 on Exhibit (its supplier in Deal 4) and a Redhill clearance dated 21 November 2005 on Regal (its supplier in Deal 5).

31. The evidence persuades us that the approach from Lexus was unusual, if not bizarre, and it seems to have been the event which was the source of Else's branching out into the wholesale export of new mobile phones in the grey market. We are not persuaded that Lexus offered to offload mobile phones to Else, for Else to export, even on the basis that what Lexus was proposing was the sale to Else of surplus stock, which Else would be able to export through use of its own contacts. As Mr de Silva stressed in his written closing submissions back to back trading using retention of title clauses and shipping on hold was (and presumably is) typical of grey market trading. If AE's account of Lexus's approach is to be taken at face value, we must assume that Lexus had stock which it was not able to export. But this would be unusual in the grey market, because it would be a departure from the practice of back to back trading. Alternatively, if the suggestion was that Lexus should obtain from other suppliers stock which it would sell (by back to back deals) to Else to enable Else to export it, that would be surprising bearing in mind AE's comment in re-examination that 'it would have been no good buying from people like that and trying to sell internally, because [AE didn't] think there would be much of a margin left'. We are left doubtful that Lexus would go to the trouble of obtaining stock and selling it on at a low margin to Else to enable Else to make a good profit on export.

32. We find therefore that this was not the basis of the offer which Lexus made to Else. We accept the point made by Mr de Silva in his written closing submissions that Officer Swinden was not called as a witness by HMRC and that the evidence suggesting that AE's recollection of the visit on 3 August 2005 is limited to Officer Swinden's non-verbatim and non-contemporaneous note of the interview. However, the note was clearly prepared soon after the visit and we can see no reason why it should have been materially inaccurate. Furthermore, in view, particularly, of the inconsistencies between AE's oral evidence and the evidence in his witness statement, we find Officer Swinden's note a more reliable record of what was said. We therefore find that Lexus approached AE about Else handling some of their (Lexus's) export sales of new phones because Lexus was unable to financially support (in relation to carrying the VAT cost pending reclaim from HMRC) all the available transactions. Although this was an unusual course for Lexus to take, and for Else to respond to, we consider that the later Deal 6 (see below), being another deal of questionable commerciality conducted between Else and Lexus, is supporting evidence that Else did deal with Lexus in a non-commercial fashion. By saying this, we do not mean that all Else's deals with Lexus were non-commercial. Whatever precise transactions were proposed by Lexus to Else and whether or not, as Mr Hiddleston suggested in his written closing submissions, Else may well have been supplied with potential customers by Lexus, we find that Lexus's approach to Else in 2005 was highly unusual, and in the context of wholesale trading in mobile phones at the time (in 2005) should on any view of Else's knowledge at that time have put Else on enquiry. Else could and should have explored further Lexus's commercial rationale for approaching Else in the way it did. This is despite the fact that Else had traded with Lexus over a long period and had found them to be '100% totally reliable', as AE put it in oral evidence.

33. Another point which became clear from the evidence concerning Officer Swinden's visit on 3 August 2005 was that AE regarded the danger of becoming involved in chains of supplies affected by fraudulent tax evasion (MTIC) as (in practice) limited to a danger of dealing directly with a dishonest trader. We say 'in practice' because we note that Else required its suppliers to vouch that they (the suppliers) had verified their supply chain (i.e. their suppliers) as well. But when AE was asked in cross-examination why he thought that certain of the due diligence measures suggested in Public Notice 726 were not necessary, he replied 'No, because I was never going to be involved in an MTIC fraud, it is as simple as that, so the answer is no. I didn't see the necessity'. And a little later on he said in answer to a question of whether he had taken advice as to the precise nature of MTIC fraud: 'No, I didn't, because I was never going to be involved in MTIC fraud, I just bought phones and sold them, and I accounted for my VAT and to my knowledge, my suppliers accounted for their VAT as well. I think this is beyond dispute'. And a little later on he said: 'I did not know that our company was trading in an area of MTIC fraud'.

34. These answers betray (at least) over-confidence on AE's part – as events have shown – and Mr Hiddleston suggested that AE had 'turned a blind eye' to the

possibility that Else might be caught up in chains of supply affected by fraudulent evasion of VAT (MTIC). AE denied this and our conclusion is that he was careless about the possibility of Else becoming caught up in such chains, possibly because (as is clear from his witness statement) he was of the opinion that Else had not itself deliberately or negligently contributed to any fraudulent evasion of VAT. If that is the reason that AE was careless as we have said, then it follows that AE misunderstood the nature of the danger of trading in the 'specified goods' to which Public Notice 726 applies – viz: 'computers and any other equipment, including parts, accessories and software, made or adapted for use in connection with computers or computer systems, and telephones and any other equipment, including parts and accessories, made or adapted for use in connection with telephones or telecommunications'. There is no reasonable explanation for either AE or JE failing to understand the nature of the danger of such trading (that is, of being 'caught up' in MTIC trading) at any time after 3 August 2005, at the latest.

35. Following the approach by Lexus, and Else's decision to enter the export trade in CPUs, mobile phones and other electronic products (which it had decided not to do in 2004), a number of deals were entered into before the deals in issue in this appeal. Although repayments of VAT were made by HMRC on a 'without prejudice' basis, the evidence before us is that there were tax losses in 8 deal chains in Else's VAT periods before 07/06.

36. Mr Hiddleston put to AE that an incentive for entering the export trade in these products was the prospect of good and easy profits, which was especially attractive because at that time the profitability of Else's core business was declining. AE strenuously denied that Else was in any sense desperate to find a new and profitable business. Although we accept that denial, we do find that the high profitability and the ease of earning profits in the export trade in these products was what attracted Else into the business and eagerness to enjoy those profits was the reason why Else was not more circumspect than it was when it entered the export trade in these products.

37. On 8 November 2005 Else made a request to HMRC to be moved from quarterly to monthly VAT returns. Such a move would enable Else to do more business in the export of mobile phones and other electronic products because it would reduce the delay in normal course between payment of VAT on the purchase of stock to recovery of the VAT following the zero-rated export. On 24 November 2005 HMRC approved Else's request to be put on monthly VAT returns.

38. In May 2006, HMRC expanded its extended verification programme to deal with requests for repayment of VAT in cases where a connection with fraudulent evasion of VAT was suspected. Else's VAT returns for the periods 07/06 and 08/06, which covered the deals in issue in this appeal, were subject to extended verification by HMRC.

39. Else entered into Deal 1 on 10 July 2006, and into Deals 2 and 3 on 18 July 2006, and into Deal 4 on 19 July 2006. Else entered into Deal 5 on 31 August 2006.

40. In the case of Deal 1, Maximise contacted Else and offered CPUs for sale. JE considered the product and the price at which they were offered for sale and contacted Enastech and France Affaires because Else had recently completed deals with each of them for the sale of CPUs. In other cases, Else would put out an 'instant messenger' message to a small 'pool' of customers indicating product which it could offer for sale. For Deals 2 and 3, again Maximise contacted Else and offered product, this time mobile phones, for sale, and JE's evidence was that Else contacted a number of potential customers before choosing to deal with Enastech again, on price grounds. For Deal 4, Exhibit approached Else with some stock and JE's evidence was that he approached a number of potential customers including Enastech, France Affaires (the eventual customer) and Sterling Telecom. For Deal 5, Regal approached Else with the offer of stock for sale, and JE's evidence was that Else approached four potential customers for that stock. Enastech was one of these, and was the eventual customer.

41. Although Else did not have an account at FCIB, its customers and direct suppliers did, as did also other parties in the chains of supply in which Deals 1 to 5 feature. JE said in evidence that he understood that so many companies banked with FCIB because they could trade at any time, having an account at that bank. He was not aware in 2006 of any criticism of FCIB as a legitimate bank. He said that Else did not feel the need for that facility because it engaged in very few trades.

42. Officer Bransgrove analysed FCIB records available to HMRC with the result that she was able to show, in relation to Deal 2, Deal 3, and Deal 4 (though not Deal 1 or Deal 5) that there was circularity, in the sense that funds received by Else from its customer and funds paid by Else to its supplier returned to the FCIB accounts of entities from which it can be shown that they originated. The entity in the case of Deal 2 was Enastech, which paid £121,236.66 to Else on 24 July 2006 and received (from TK Components Ltd of Malta – at two steps removed from Else's supplier, Maximise) €182,500 on 28 July 2006. The entity in the case of Deal 3 was also Enastech, which paid £121,236.66 to Else on 24 July 2006 and received, also from TK Components Ltd of Malta – again, at two steps removed from Else's supplier, Maximise - €182,500 on 28 July 2006. It is noteworthy that the chains of supply in Deals 2 and 3 and the money chains in those deals were identical. In Deal 2, Else bought 500 Nokia 3220 phones for £135,507 (inclusive of VAT) and sold them for £121,250 (with no VAT in addition); in Deal 3, Else bought 1,500 Nokia 6101 phones for the same amount (£135,507 inclusive of VAT) and sold them for the same amount (£121,250 with no VAT in addition). The entities both receiving and paying funds in the case of Deal 4 were Maks Information Technology of Pakistan, Marxman International of Dubai and Nordic Telecommunications of Denmark. The money flows in this deal were more complicated to analyse, but Mr de Silva and AE accepted that circularity of funds had been proved.

43. As stated above, Else accepted at the start of the hearing that HMRC had shown both fraudulent evasion of VAT in the supply chains of all 5 Deals and the connection between Else's respective purchase transactions and such fraudulent evasion of VAT. Else accepted that HMRC's evidence analysing FCIB records showed circularity of funds in Deals 2, 3 and 5 and also that this showed that the supply chains in of which those Deals were part were 'contrived'. Although similar circularity has not been proved in relation to the supply chains of which Deals 1 and 5 were part, we find, on the balance of probabilities that those supply chains were also 'contrived'. The supply chains from Technologz to Else *via* Maximise in Deals 1 and 2 were identical. In Deal 5, the goods passed from Cybersol through two 'buffer' traders to Regal, who sold them to Else. The mark-up enjoyed by the two 'buffer' traders was 10p and 65p per unit respectively, whereas Else made an ex-VAT profit on its export sale of £5.50 per unit,

44. At the end of his oral evidence, AE confirmed to the Tribunal that Deals 1 to 5 were the only export deals carried out by Else and that they were all connected to fraudulent evasion of VAT. His explanation as to why Else had found itself in this position was that it had been 'ring-fenced' or 'used like patsies', by which we understood him to mean that Else had been manipulated, without knowing it, by fraudulent persons into exporting goods which had been supplied in a chain of supply where there had been a fraudulent evasion of VAT. JE, under cross-examination, also offered this explanation and made the point that if Else had sold to another of the possible customers, that customer also might have been involved in the circularity that was demonstrated, so that, contrary to what was put to him by Mr Hiddleston, the whole money chain would not have collapsed.

45. On 10 July 2006, the same day as Deal 1 took place, Else purchased 3,000 Nokia N80 telephones from Emmen Communications Limited and sold them on to Lexus – a domestic sale, referred to at the hearing as **Deal 6** – at an uplift of 50 pence per unit, a much smaller margin than was achieved by Else in its export sales, which, in Deal 1 (a deal in CPUs), was £3.10 per unit. Deal 6 was also in a chain which included a fraudulent evasion of VAT (as HMRC later discovered). AE was asked in cross-examination why Else did that deal with Lexus for that much reduced level of profit, on the same day as Else did Deal 1 with Enastech for a much larger profit, particularly as his evidence was the Enastech had indicated it would take as many phones as could be provided and, albeit in the previous year (2005), Lexus had approached Else to say that it could not handle all the export sales available to it. His first answer was that Else was already committed to carrying a large amount of VAT pending reclaim from HMRC and the decision to trade with Lexus would have been prompted by a desire not to increase the amount of VAT being carried in that month. But AE revised that answer when it was put to him by Mr Hiddleston that on 18 July, 8 days later, Else entered into export deals in mobile phones with Enastech (Deals 2 and 3), increasing the amount of VAT being carried in the same month. AE then said that the explanation for the decision to trade with Lexus in Deal 6 (rather than with Enastech or another foreign customer) was a matter of commercial judgment, of mood or feeling. JE suggested that the reason for not selling to Enastech in Deal 6 might in part have been because of the effort of changing the maximum insurance

cover per load, but he never enquired of the insurance company, or of Enastech of the possibility of trading the phones in Deal 6 with them (instead of with Lexus).

46. Notwithstanding Else's denials, we regard the evidence relating to Deal 6 as supporting HMRC's case that Else was engaged in a contrived pattern of trading whereby it lent itself to arrangements to trade which would further the intentions of persons who were intent on profiting from fraudulent evasion of VAT by way of MTIC transactions. Else appears to have been peculiarly ready to oblige Lexus.

47. We accept the general submissions of HMRC regarding the inadequacy of Else's due diligence and implementation of the checks suggested in Public Notice 726. Else did not obtain trade references from its suppliers and customers, Else did not obtain credit checks on suppliers and customers from independent third parties and Else did not insist on making personal contact with a representative of each supplier or attempt to make an initial visit to each supplier's premises (JE met with some but not all of them, but did not visit any supplier's premise). No visits were made to freight forwarders, or to customers' premises. This is clear from answers given to questions put at a meeting on 4 October 2006, between Officer Woodfield, with Officer Zajac, and AE and JE, and also from AE's and JE's oral evidence. We had Officer Zajac's notes of the meeting in evidence. HMRC (but not Else) had obtained an Experian report which showed that Maximise was a company which was said to be at maximum risk. Else did not record IMEI numbers of the mobile phones it traded.

48. Else did not check the supplier declaration forms received because it did not have time to do so, and anyway it relied on inspection reports which stated that the goods in question were at the freight forwarder's premises and that they were the seller's property to deal in. (JE accepted that the inspection company had been instructed by the freight forwarder, and not by Else.) AE made the point that the supplier declaration forms had not been criticised at VAT inspections. JE accepted that the inspection reports suggested (by reference to the observations contained in them about two-pin plug chargers, for example) that the goods must have come from outside the UK. JE also accepted that Else's customer (Enastech was taken as an example) would be bound to be a dealer and to be proposing to sell the goods onwards out of Dubai. We accept from the evidence that Else had the means of knowing that there were at least five entities in the chain of supply (the original non-UK supplier, Else's immediate UK supplier, Else itself, Else' non-UK customer and that non-UK customer's customer). JE accepted that in hindsight such a chain would not have any commercial rationale. He denied that this was obvious to him at the time that Else transacted the deals and suggested that the transactions were commercial 'because there was a trade in mobile phones' by which he meant the grey market.

49. The Redhill clearances on Else's suppliers in the deals in issue were obtained many months before the deals themselves, and when Mr Hiddleston put the point to AE that they therefore did not assist Else in being able to tell whether or not those suppliers were VAT registered when the deals took pace, AE's response was that in business 'we are not constantly re-verifying' and if they did constantly re-

verify '[they] would never get any work done'. Else made the assumption that the VAT registrations were still valid. AE pointed out that its suppliers were VAT registered and accounted for the VAT due from them on the deals in issue. AE accepted in cross-examination that Else had not acted with due diligence in relation to VAT registration verification, while pointing out that Public Notice 726 had not made it a requirement that a Redhill clearance should be obtained before every transaction.

50. Else did obtain reports on Exhibit (on 25 August 2006) on Regal (on 6 September 2006) and on Maximise (on 19 September 2006) from an independent third party (Veracis Limited ("Veracis")). Regal had originally commissioned a report from Veracis on Else and that is why Else referred to Veracis for reports on their suppliers. AE said that it was done as a 'useful precaution' in the light of Public Notice 726 – 'we already felt we were doing adequate due diligence and this is a hindsight report'. AE also said that in any case Veracis reports would not have influenced any decision made by Else. This was in spite of the fact that the report on Maximise had stated that it had only been trading for 12 months for which the estimated turnover was about £80 million, had only two employees – the director and his brother – and that they had no great experience in IT, having been ladies fashion traders, and that the report on Exhibit stated that that company had turned over between £60 million and £100 million in its first trading year. The report on Regal stated that its premises were an office in the grounds of the University of Westminster and rented on a monthly basis and that its estimated turnover for the first full year of trading was about £60 million. (We note that when these facts were put to him in cross-examination, AE described the information as 'staggering'.) In the event the reports were commissioned at the tail-end of Else's trading in mobile phones and other MTIC-affected goods and were of no use to Else at all. Else terminated such trades when it became clear that reclaims of input VAT might not be met. While Else was trading, AE stated in terms that Else's 'sole criteria' on deciding to do a deal or not, was that Else must be satisfied by a third party that the goods existed and that the supplier had a clear title to the goods. He had 'derisked [his] business by not offering any credit'.

51. It is a noteworthy feature of Else's trading in the deals in issue that Else pays its suppliers having already been paid by its customers. It is not clear why the suppliers would be prepared to take a commercial risk which Else itself was unwilling to take, as Else would only release goods after payment. There are also, at least theoretical, difficulties in that where (as in Deals 1 to 4) the goods passed under contracts providing for reservation of title to the seller until payment, the conclusion is unavoidable (and was accepted by AE as 'a mistake') that Else has 'sold' goods to its customer, without having itself title in the goods before the sale. (JE, when questioned on this, regarded it as a normal way of carrying out back to back trading.) Further, Mr Hiddleston was able to point out to AE that the goods which were the subject of Deal 4 were released by Else to its customer, France Affaires, by a release note dated 3 August 2006 (the date of payment by France Affaires to Else), and were released by Else's supplier, Exhibit, to Else by a release note dated 4 August 2006. AE accepted that this made no sense

whatsoever and could not supply an answer beyond speculating that 'input from the supplier to the freight forwarder might play a part in this as much as that maybe the freight forwarder is the one who releases the goods and they might be delayed', by the need for the freight forwarder to have Exhibit's confirmation that it had been paid.

52. Else had no written contracts with customers or suppliers providing for any terms as to date of payment, returns policy or damaged or faulty goods, or shipping or delivery. Else's sales invoices were printed with language to the effect that it was a condition of a sale that the goods remained the property of Else until payment had been received in full. AE explained that terms were negotiated informally and that there was no practical business need for detailed written contracts, particularly bearing in mind that Else only released goods on payment. Also, there was no, and in AE's view there was never likely to be, any issue about damaged goods between Else and its customers, which would not be covered by insurance. Nevertheless the goods were exported in all the deals under consideration and Else bore the cost of shipping the goods to freight forwarders in France (Deal 4, where Else's customer was France Affaires) or Dubai (Deals 1, 2, 3 and 5, where Else's customer was Enastech), pending a sale which could, theoretically, have fallen through for whatever reason, giving rise to significant wasted costs.

53. There was no specification in Else's documentation of the goods being sold to its customers beyond the manufacturer and model number. In particular, there was no specification (in relation to mobile phones) of frequency, network configuration, warranty details, language types, batteries, rechargers or manual languages or (in relation to iPod Nanos) of colour, manual, boxing, chargers or warranty. AE's response when challenged on this point in cross-examination (in relation to mobile phones) was that Dubai (where Enastech was based) was a central trading hub for African and Asian countries and any modifications necessary would be done there at low cost.

54. There was a dispute over payment between Else and its supplier, Regal, in relation to Deal 5. £20,000 was paid by Else to Regal without difficulty on 6 September 2006, but Regal had to chase Else at least 4 times over a period of 6 weeks, eventually threatening to put the matter in the hands of their debt collection team. This was because the delivery to Dubai was held up by a Customs inspection and the goods arrived in Dubai after Ramadan had started. Enastech informed Else that it had lost its customer and the £20,000 which was paid by Else to Regal was funded out of a 'holding deposit' requested and paid to Else by Enastech. Eventually, on 2 October 2006, Else decided to release the goods to Enastech before payment by them. Else paid Regal the balance on 13 November 2006, before, eventually, on 22 or 23 November 2006, a balancing payment was received from Enastech. This deal was not conducted according to Else's normal procedures. AE explained that the market in the goods was falling and a commercial decision was taken by Else exceptionally to release the goods to Enastech before receipt of payment from them. AE told Mr Hiddleston that Else had 'ignored' Regal's pressing demands. Mr Hiddleston suggested to AE that this

was because Else knew that Regal never would actually enforce payment. AE denied this and explained that the matter was dealt with as business matters are dealt with and the debt was eventually paid without any enforcement action being taken. Else had done a number of deals with Enastech and although Else took a risk in releasing the goods to them in Deal 5 before payment, it was a calculated risk based on the 'level of trust' that had been built up.

Discussion and Decision

Actual knowledge

55. We have concluded that HMRC have failed to show on the balance of probabilities that AE or JE, and therefore Else, had actual knowledge of the connection between the transactions it entered into in Deals 1 to 5 inclusive and fraudulent evasion of VAT.

56. We accept that all the chains of supplies in which Deals 1 to 5 inclusive feature were contrived for fraudulent effect – as most clearly demonstrated by the circularity of payments shown by Officer Bransgrove from the FCIB evidence.

57. However we do not accept the premise, which Mr Hiddleston advanced insistently, that Else *had* to deal with the particular parties it dealt with in order for the circular chains to be maintained. We consider it is certainly possible (and may indeed be likely) that the organisers of the fraud saw a benefit in using a 'patsy' (or unknowing party whom they manipulated) as the 'Broker' in the chain – that is, the party who would claim a refund of VAT from HMRC. Further, we consider it possible (and maybe likely) that the organisers of the fraud had sufficient flexibility of approach that if a broker in the position of Else decided to sell to one party rather than another, then the chain could be maintained, either by the supplier to the broker pulling out, or, more likely, an onward sale being arranged to be made by the customer chosen by the broker, which onward sale would resurrect the chain. In making this suggestion we are inferring from the evidence that all the (relatively few) parties which Else might have chosen as its customer – the 'pool' of customers to which JE made reference – had positioned themselves to be the entities which Else would most likely contact with offers to sell product and were knowingly involved in the fraud.

58. The circularity of payments does not in our judgment prove that Else had knowledge of the fraud. Mr Hiddleston did not submit that the circularity on its own proved knowledge, but that it did, when coupled with the other evidence. We reject this submission for the reasons given above.

59. From the evidence we infer that JE did not have any relevant knowledge which AE did not have, and *vice versa*.

60. We have found that Else dealt with Lexus in a non-commercial fashion in relation to Lexus's approach to Else with regard to Else handling some of their export sales and in relation to the Deal 6 domestic supply. We find that Lexus had some participation in supply chains connected with fraudulent evasion of VAT (whether knowingly or unknowingly) and Else's non-commercial dealings with

Lexus are evidence suggesting knowledge on AE's and JE's part that the export transactions which Else entered into were connected with fraudulent evasion of VAT. However that evidence is not enough to persuade us that HMRC has proved that Else had relevant actual knowledge on the balance of probabilities.

61. We also consider that the evidence of the delayed payment of the balance of the purchase price due to Regal in Deal 5 (which in our judgment shows a non-commercial attitude on the part of both Else and Regal) goes a little way towards proving that Else had relevant actual knowledge of the connection with fraud in that Deal – but, again, that evidence, even combined with the evidence of non-commercial dealing with Lexus – does not persuade us that HMRC has proved that Else had relevant actual knowledge on the balance of probabilities.

62. In determining whether it is more probable than not that Else had actual knowledge of the fraud, we take into account the fact that (as we find) it was inherently improbable that Else would enter into transactions in the knowledge that they were connected to fraudulent evasion of VAT. In this context we take into account the value to Else of its reputation with important public and private sector customers for highly professional conduct in its core business of the disposal of electronic assets, a reputation built up over many years and which we infer AE and JE realised could be quickly lost if it was known that Else had knowingly participated (however remotely) in VAT fraud. With this in mind we would require compelling evidence of actual knowledge to be satisfied that Else knew of the connection with fraud and we did not find the evidence pointing in that direction to be sufficiently compelling to discharge the burden of proof.

63. On the contrary, our impression was that AE and JE were generally satisfactory witnesses, ready to admit the shortcomings in Else's due diligence which were put to them in cross-examination and generally not evasive. An exception to this was our impression of the self-serving nature of AE's evidence in relation to Officer Swinden's note of the meeting on 3 August 2005 and both AE's and JE's evidence in relation to why Else entered into Deal 6. But on balance we accept AE's and JE's evidence that they did not know of Else's connection with the 5 cases of fraudulent evasion of VAT in the Deals in issue. As we have said above, rather than finding that AE or JE turned a 'blind eye' to the possibility that Else might be caught up in chains of supply affected by fraudulent evasion of VAT, our judgment on the evidence is that they were careless about this possibility and did not really understand what being caught up in such chains of supply entailed in practical terms.

Whether Else ought to have known of the connection with fraud – whether the only reasonable explanation for the circumstances in which the Deals took place was that they were connected to fraud

64. We have reached the clear conclusion that the only reasonable explanation for the circumstances in which Deals 1 to 5 inclusive took place was that they were connected to fraudulent evasion of VAT and the appeal fails on this basis.

65. First of all, we consider that the deals were 'too good to be true' in terms of the profit to be earned for so little work done. We have found that the high profitability and ease of earning profits was what attracted Else into the export business in these products. By 'too good to be true' we mean not reasonably explicable as being the result of legitimate business and therefore (in the context of trade in the electronic products concerned) being only reasonably explicable as being connected to fraudulent evasion of VAT.

66. According to our calculations taken from HMRC's deal chain sheets, Else made a gross ex-VAT profit (out of which we accept certain costs had to be met) of £13,671 on Deal 1; £1,050 on Deal 2; £4,500 on Deal 3; £33,000 on Deal 4; and £11,000 on Deal 5. The gross ex-VAT profit on Deals 1 to 5 totals £63,221. The work done to earn these profits would have taken a matter of minutes, or hours at the most.

67. We also find that the casual way in which Else conducted the business involved in Deals 1 to 5 inclusive is evidence of the easy nature of the work needed to earn the significant profits referred to, which supports the conclusion that the deals were 'too good to be true'. We have accepted the general submissions of HMRC regarding the inadequacy of Else's due diligence and implementation of the checks suggested in Public Notice 726. These included not obtaining trade references from suppliers and customers, not making personal contact with representatives of suppliers and customers, not making initial visits to suppliers' premises, not recording IMEI numbers, not checking supplier declaration forms, not vouching for the accuracy of inspection reports, relying on out-of-date Redhill clearances of suppliers, and having no written contracts with suppliers dealing with dates of payment, returns policy for damaged or faulty goods.

68. We also find that inherent circumstances of the deals in issue suggested that they were connected to fraudulent evasion of VAT, and that, therefore, as deals they were 'too good to be true'. We refer in this regard to the lack of specification of the goods being traded, and the fact that inspection reports showed that mobile telephones involved were equipped with two-pin chargers, unsuitable for use in the UK and therefore raising the question why they were in the UK and being sold to Else by a UK trader. We also refer in this regard to the fact which should have been obvious to AE and JE at the time of the deals, that they involved a supply chain of at least 5 entities, which, because of the subdivision of the total profit commercially available on the supply of these products among participants in the chain of supply, was an indication that the chain was fraudulent. We also refer in this regard to the lack of commerciality of suppliers (including Else) not – at any rate in normal circumstances, unlike those prevailing in relation to Deal 5 – being willing to release goods except against payment by the customer, but yet purporting to retain title pending payment. This resulted, as Mr Hiddleston demonstrated (and neither AE nor JE had any cogent response) in Else, and others in the supply chain, effectively selling goods which they did not own. We also refer in this regard to the fact that Else was prepared to incur the costs of shipping goods 'on hold' to freight forwarders established in foreign jurisdictions, even

though there was a logical possibility that the goods might be damaged or otherwise rejected by the customer, and the costs of transport lost.

69. We find that Else (that is, both AE and JE) were careless about the real (as opposed to theoretical) likelihood that Deals 1 to 5 might be connected with fraudulent evasion of VAT. The reason for this could have been eagerness to make the easy profits apparently available, or a genuine failure (despite the terms of Public Notice 726) to understand the nature of the danger of apparently innocent and legitimate transactions being in reality connected with fraud. We find that the actual reason was a combination of the two, but we find that AE's and JE's failure to understand the nature of the danger was the predominant factor.

70. This failure to understand the nature of the danger was shown by AE's evidence in relation to Officer Swinden's visit on 3 August 2005. AE thought at the time (and, according to his evidence, until some stage in the preparation of the case for hearing) that the danger of becoming involved in chains of supply affected by fraudulent evasion of VAT was limited to a danger of dealing directly with a dishonest trader. In addition, and probably as a consequence of this failure to understand the nature of the danger to Else, Else placed too little emphasis on conducting its business in such a way as to minimise the danger of its becoming involved in supply chains affected by fraud and too much emphasis on conducting its business in these MTIC-affected products in what AE considered was an ordinary commercial fashion.

71. An example of this was his resistance to understanding the need for an up-to-date Redhill check of Else's supplier before each deal. He said that in business 'we are not constantly re-verifying' because otherwise 'we would never get any work done'. Another example was AE's and (less emphatically) JE's assertion that if they had known the results of the Veracis reports on their suppliers before the deals were done, it would not have influenced the decisions by Else to do the deals. This assertion, when made by AE, was based on his view that the due diligence they had conducted was adequate. But we find that the due diligence conducted by Else was not adequate or proportionate in the context of trade in MTIC-affected products in 2006. In cross examination AE adhered to his view that the results of the Veracis reports would not (if known when the deals were done) have made any difference to Else's decisions to trade. He said that he had 'derisked' his business by not offering any credit. This displays a commercial view which is understandable and may be appropriate to an ordinary trade in which there is no risk of unwitting involvement in VAT fraud, but is a quite inappropriate and careless attitude where the business involved was trade in MTIC-affected products in 2006.

72. For these reasons we conclude that the only reasonable explanation for the circumstances in which Else's purchases in Deals 1 to 5 inclusive took place was that the purchases had been (or would be) connected to the fraudulent evasion of VAT. That is, in short, why the deals were 'too good to be true'.

73. In reaching this conclusion we believe we have avoided the error of judging the evidence with the benefit of hindsight. Deals 1 to 5 inclusive could have been seen at the time to be 'too good to be true' by reference to circumstances objectively ascertainable at the time the deals were done – the high gross profit, the little work needed to be done to earn it, the ease of implementing the deals in the casual way the business was conducted and the lack of specification of the products dealt in – to mention only a few aspects.

74. We do not accept Mr de Silva's submission that the fact that Deals 1 to 5 were typical of grey market trading at the time, combined with HMRC's acceptance that not all trade in the grey market in mobile telephones and electronic goods in 2006 was fraudulent, prevents us from regarding the aspects of the Deals in question as evidence that Else ought to have known that they were connected to fraud and that this was the only reasonable explanation for the circumstances of the Deals. The answer to this point is in our judgment contained in a passage of Officer Stone's evidence (which was not challenged at the hearing) in which he says:

> 'I do not doubt that there is a genuine grey market in mobile phones which exists to meet the needs of consumers. But I do doubt that this market accounts for more than a relatively small proportion of the wholesale mobile phone trade quantified in the table [included in his evidence]. As described above, the overall volume of trade has risen and fallen at the same time as the promulgation of key ECJ judgments and the introduction of key anti-MTIC measures …'

75. It is not, in our judgment, a reasonable explanation of the circumstances of the Deals that they were deals in chains of genuine grey market trading existing to meet the needs of consumers. They were not deals in such chains and the fact, for example, that it was objectively ascertainable at the time the deals were done that there were (at least) 5 entities in the relevant supply chains makes unreasonable any inference, made at the time, that they might have been deals in chains of genuine grey market trading. The same conclusion can be drawn from other aspects of the deals as itemised above including the lack of specification of the goods being traded, and the fact that inspection reports showed that mobile telephones involved were equipped with two-pin chargers, unsuitable for use in the UK and therefore raising the question why they were in the UK and being sold to Else by a UK trader.

76. In regard to the submission made by Mr de Silva that HMRC must demonstrate that there was a check which Else could and should reasonably have made, that Else did not make that check, and that if Else had made that check the result would have been that it would have known that there was no reasonable explanation for the deal other than that it was connected to a fraudulent default, we need mention only the Veracis reports (the same point applies to other credit checks).

77. The Veracis reports were, plainly, checks which Else could and should reasonably have made at a time or times when they would have been of use in deciding whether or not to do Deals 1 to 5 inclusive. Else did not obtain Veracis

reports at such a time or times. If they had obtained them at such a time or times, they would have found out *inter alia*, about the remarkable first-year turnover of Maximise, Exhibit and Regal, which AE described under cross-examination as 'staggering'. It is, we consider, idle to suggest in those circumstances that if AE or JE had read the reports carefully, they would not have known that there was no reasonable explanation for being offered MTIC-affected goods by these parties other than that the transactions proposed were connected with fraud. That judgment has to be made in the real world and we cannot accept that there could have been a different reasonable explanation. This is so even if AE's insistence in re-examination is to be taken at face value, namely that increases in suppliers' turnover, such as revealed by the Veracis reports, were not something which would have made him believe that the transactions concerned must have been connected to fraud.

78. For the reasons given above the appeal is dismissed.

Right to apply for permission to appeal

79. This document contains full findings of fact and reasons for my decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 23 July 2012